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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
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12 GREGORY MITCHELL,) No. CV 06-4419 CW
13)
14 Plaintiff,) DECISION AND ORDER
15 v.)
16)
17 MICHAEL J. ASTRUE,)
18 Commissioner, Social Security)
19 Administration,¹)
20)
21 Defendant.)
22 _____)
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19 The parties have consented, under 28 U.S.C. § 636(c), to the
20 jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks
21 review of the Commissioner's denial of disability benefits. As
22 discussed below, the court finds that the Commissioner's decision
23 should be reversed and this matter remanded for further proceedings.

24 I. BACKGROUND

25 Plaintiff Gregory Mitchell was born on June 20, 1967, and was
26 thirty-seven years old at the time of his administrative hearing.

27 _____
28 ¹ Michael J. Astrue is ordered substituted as defendant pursuant
to Fed. R. Civ. P. 25(d)(1).

1 [Administrative Record, "AR," 33, 152.] He has a tenth grade
2 education and no past relevant work experience. [AR 155-56.]
3 Plaintiff alleges disability on the basis of a degenerative hip, lower
4 back problems, cerebral palsy,² headaches and high blood pressure. [AR
5 34, 43.]

6 **II. PROCEEDINGS IN THIS COURT**

7 Plaintiff's complaint was lodged on July 13, 2006, and filed on
8 July 17, 2006. On January 25, 2007, defendant filed an answer to the
9 complaint and plaintiff's Administrative Record ("AR"). On March 23,
10 2007, the parties filed their Joint Stipulation ("JS") identifying
11 matters not in dispute, issues in dispute, the positions of the
12 parties, and the relief sought by each party. This matter has been
13 taken under submission without oral argument.

14 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

15 Plaintiff filed an application for supplemental security income
16 ("SSI") on September 18, 2003, alleging disability since January 1993.
17 [AR 43.] After the application was denied initially and upon
18 reconsideration, plaintiff requested an administrative hearing, which
19 was held on June 8, 2005, before Administrative Law Judge ("ALJ")
20 Robert Evans. [AR 152.] Plaintiff appeared with counsel, and
21 testimony was taken from plaintiff and vocational expert Sandra
22 Schneider. [Id.] The ALJ denied benefits in a decision dated August
23 18, 2005. [AR 23-27.] When the Appeals Council denied review on May
24 18, 2006, the ALJ's decision became the Commissioner's final decision.
25 [AR 4.]

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28 ² Since the filing of his disability application, plaintiff has
denied any history of cerebral palsy. [AR 82.]

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V. DISCUSSION

A. THE FIVE-STEP EVALUATION

To be eligible for disability benefits a claimant must demonstrate a medically determinable impairment which prevents the claimant from engaging in substantial gainful activity and which is expected to result in death or to last for a continuous period of at least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at 721; 42 U.S.C. § 423(d)(1)(A).

Disability claims are evaluated using a five-step test:

Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.

Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If so, the claimant is automatically determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or "not disabled" at any step, there is no need to complete further steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

Claimants have the burden of proof at steps one through four, subject to the presumption that Social Security hearings are non-adversarial, and to the Commissioner's affirmative duty to assist

claimants in fully developing the record even if they are represented by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at 1288. If this burden is met, a prima facie case of disability is made, and the burden shifts to the Commissioner (at step five) to prove that, considering residual functional capacity ("RFC")³, age, education, and work experience, a claimant can perform other work which is available in significant numbers. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE

Here, the ALJ found that plaintiff had not ever engaged in substantial gainful activity (step one); that plaintiff had "severe" impairments, namely lower back pain and hip pain (step two); and that plaintiff did not have an impairment or combination of impairments that met or equaled a "listing" (step three). [AR 26.] Plaintiff was found to have an RFC for a range of light work. [AR 27.] Plaintiff had no past relevant work (step four). [AR 26.] The vocational expert testified that a person with plaintiff's limitations could perform other work existing in significant numbers in the national economy, including cashier and assembler (step five). [Id.] Accordingly, plaintiff was found not "disabled" as defined by the Social Security Act. [Id.]

³ Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to work without directly limiting strength, and include mental, sensory, postural, manipulative, and environmental limitations. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 **C. PLAINTIFF'S PRESENT CLAIMS**

2 The parties' Joint Stipulation identifies two disputed issues:

3 1. Whether the ALJ properly evaluated the medical evidence; and

4 2. Whether the ALJ properly evaluated plaintiff's credibility.

5 [JS 2.]

6 **D. ISSUE ONE: THE EXAMINING OPINION AND SUBSEQUENT EVIDENCE**

7 In 1983, when he was sixteen years old, plaintiff suffered a
8 sports injury to his back and hip, requiring a left hip replacement.
9 [AR 24.] Since then, plaintiff had a brief stint in physical therapy
10 and has been taking pain medication. [AR 80, 135.] Dr. Rocely Ella-
11 Tamayo performed an internal evaluation of plaintiff on June 23, 2004,
12 at the request of the California Disability Determination Service. [AR
13 82-86.] There were no medical records available for Dr. Tamayo to
14 review, so she based her evaluation on a physical examination and
15 history provided by plaintiff. [Id.] With respect to plaintiff's
16 back, Dr. Tamayo found "no deformity, tenderness or spasm. There is
17 full range of motion without pain." [AR 85.] With respect to the left
18 hip, Dr. Tamayo noted "pain on normal range of motion of the left
19 hip." [Id.] An x-ray taken of plaintiff's hip at the time of Dr.
20 Tamayo's examination revealed "generalized osteopenia and trabecular
21 effacement" with the "possibility of arthritic thinning of the femoral
22 head cortex." [AR 87.] Dr. Tamayo concluded that plaintiff's
23 "prognosis is not good regarding his left hip condition." [AR 85.]
24 Based on her evaluation, Dr. Tamayo opined that plaintiff was not
25 necessarily precluded from working and could lift fifty pounds
26 occasionally and twenty-five pounds frequently while sitting, standing
27 and walking for four hours during an eight-hour workday. [Id.]

28 Upon reviewing Dr. Tamayo's opinion, a state agency review

1 physician assessed a more modest RFC, for light work, based on
2 plaintiff's pain. [AR 89, 97-98.] There were no other medical records
3 made available to the state agency review physician. [AR 97.] The ALJ
4 found that these two medical source opinions were "consistent with the
5 objective findings" and "not rebutted by any treating source" and,
6 thus, determined that plaintiff had an RFC for a range of light work.
7 [AR 25.]

8 After Dr. Tamayo performed her evaluation, plaintiff submitted
9 medical records from Harbor-UCLA Medical Center for treatment he
10 received for his back, hip and hypertension for the period from
11 approximately 2003 to 2005. [AR 99-148.] Plaintiff contends that
12 these treating records prove that his condition deteriorated after Dr.
13 Tamayo's examination, that Dr. Tamayo's evaluation is invalid because
14 she "did not have the benefit of these objective test results," and
15 that the "ALJ should have contacted the treating source for an opinion
16 concerning his impairments and limitations." [JS 4.] Upon a review of
17 the administrative record, although it is unclear that plaintiff's
18 condition has deteriorated or that Dr. Tamayo's examination is
19 invalid, newly-provided evidence of plaintiff's lower back problem
20 will require further development as to plaintiff's functional
21 limitations.

22 An ALJ has an affirmative duty to develop the record when the
23 evidence is ambiguous or inadequate to make a finding of disability.
24 See Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005); Mayes v.
25 Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001); Tonapetyan, 242 F.3d
26 at 1150; Smolen, 80 F.3d at 128; see also 20 C.F.R. § 416.912(d).
27 This duty may be discharged in several ways, including recontacting
28 the treating medical source, referral of plaintiff for a consultative

1 examination, or referral to a medical expert. See Bayliss v.
2 Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005); Thomas v. Barnhart, 278
3 F.3d 947, 958 (9th Cir. 2002); Reed v. Massanari, 270 F.3d 838, 841
4 (9th Cir. 2001); Armstrong v. Comm'r of Soc. Sec. Admin., 160 F.3d
5 587, 590 (9th Cir. 1998); 20 C.F.R. §§ 416.912(e)-(f), 416.919a.

6 Here, plaintiff's primary allegations of disabling impairments
7 arise from his lower back and left hip. The Harbor-UCLA treatment
8 records include a September 2003 x-ray of plaintiff's lumbar spine, a
9 March 2005 x-ray of the left hip, an April 2005 MRI of the lumbar
10 spine, emergency treatment records, and physical therapy records. [AR
11 117, 122, 124, 125-132, 135.] Because neither the treating physician,
12 Dr. Tamayo, nor a medical expert had an opportunity to review the
13 records to determine whether they indicated plaintiff had functional
14 limitations more restrictive than those determined by Dr. Tamayo or
15 the state agency physician, remand for such proceedings is
16 appropriate.

17 To the extent that plaintiff argues that Dr. Tamayo's opinion is
18 invalid and that the treating records indicate a deterioration in
19 plaintiff's condition, the record does not clearly establish this. As
20 part of her evaluation, Dr. Tamayo referred plaintiff for an x-ray of
21 his left hip showing degenerative changes, thus negating plaintiff's
22 contention that the doctor's opinion was completely uninformed. [AR
23 87.] Moreover, it is not clear that the treating medical evidence
24 cited by plaintiff indicates a worsening of his condition, in light of
25 the conservative nature of his treatment at Harbor-UCLA, comprised of
26 physical therapy and pain medication. Finally, nothing prevented
27 plaintiff from addressing the ambiguity in the record that he
28 complains of; he could have recontacted the treating physician for

1 clarification, as the ALJ left the record open for thirty days after
2 the administrative hearing for such a purpose. [AR 166.]

3 Upon remand, the record should be developed through any of the
4 methods mentioned above.

5 **E. ISSUE TWO: THE CREDIBILITY FINDING**

6 During the hearing, plaintiff testified that he has never worked
7 because "I'm in terrible pain," and that he does little throughout the
8 day except "sit in the house and watch the cars go by." [AR 156, 161.]
9 The ALJ found plaintiff's testimony on the whole "not entirely
10 credible" because it was not consistent with the record, plaintiff had
11 received conservative treatment for his pain, made inconsistent
12 statements, had no work history, and participated in daily activities
13 inconsistent with his allegations. [AR 25.] Plaintiff contends that
14 this finding is unsupported by clear and convincing evidence because
15 the ALJ "failed to adequately specify" which statements he found not
16 credible. [JS 9.] Upon review of the record, however, it is evident
17 that the ALJ's finding was supported by substantial evidence that a
18 reasonable person might accept as adequate to support his conclusion.

19 Generally, questions of credibility and resolution of conflicts
20 in the testimony are functions solely for the Commissioner. Parra v.
21 Astrue, __ F.3d __, 2007 WL 865543 at *6 (9th Cir. March 23, 2007)
22 (citing Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982)).
23 However, an ALJ may not reject a claimant's testimony without
24 providing "clear and convincing reasons." Id.; Holohan v. Massanari,
25 246 F.3d 1195, 1208 (9th Cir. 2001). Also, an ALJ must "specifically
26 identify" the testimony found not credible, the ALJ must "explain what
27 evidence undermines the testimony," and the evidence on which the ALJ
28 relies must be "substantial." Id.; see also Tonapetyan, 242 F.3d at

1 1148 ("The ALJ must give specific, convincing reasons for rejecting
2 the claimant's subjective statements."); Light v. Social Security
3 Admin., 119 F.3d 789, 792 (9th Cir. 1997).

4 Contrary to plaintiff's contention, the ALJ cited specific
5 evidence in the record, as well as inconsistencies among plaintiff's
6 statements, to find plaintiff's testimony less than completely
7 credible. For example, the ALJ cited plaintiff's lack of ongoing care
8 and his brief treatment with physical therapy, with which he was non-
9 compliant, as evidence that his pain was not as severe or as limiting
10 as alleged. See Parra, 2007 WL 865543 at *6 ("[E]vidence of
11 'conservative treatment' is sufficient to discount a claimant's
12 testimony regarding severity of an impairment.")(citing Johnson v.
13 Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995)). The ALJ also cited the
14 inconsistencies in plaintiff's statements regarding his daily
15 activities as negatively impacting his credibility: for example,
16 although plaintiff testified that he could not read and was in too
17 much pain to watch television or take the trash out, he earlier stated
18 that he read the Bible and sports magazines, watched television and
19 helped out with light chores such as taking out the trash. [AR 51, 83,
20 161, 162.] See Tonapetyan, 242 F.3d at 1148 (holding that an ALJ may
21 use "ordinary techniques of credibility evaluation," such as
22 inconsistent statements in testimony)(citing Fair v. Bowen, 885 F.2d
23 597, 604 n. 5 (9th Cir. 1989). Accordingly, "the ALJ did not err in
24 finding [plaintiff] only partially credible, and weighing [his]
25 testimony accordingly." Parra, 2007 WL 865543 at *6.

26 **F. REMAND FOR FURTHER PROCEEDINGS**

27 The decision whether to remand for further proceedings is within
28 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,

1 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
2 further proceedings, or where the record has been fully developed, it
3 is appropriate to exercise this discretion to direct an immediate
4 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
5 remand for further proceedings turns upon their likely utility).
6 However, where there are outstanding issues that must be resolved
7 before a determination can be made, and it is not clear from the
8 record that the ALJ would be required to find the claimant disabled if
9 all the evidence were properly evaluated, remand is appropriate. Id.
10 Here, as set out above in Issue One, outstanding issues remain before
11 a finding of disability can be made. Accordingly, remand is
12 appropriate.

13 **VI. ORDERS**

14 Accordingly, **IT IS ORDERED** that:

15 1. The decision of the Commissioner is **REVERSED**.

16 2. This action is **REMANDED** to defendant, pursuant to Sentence
17 Four of 42 U.S.C. § 405(g), for further proceedings as discussed
18 above.

19 3. The Clerk of the Court shall serve this Decision and Order
20 and the Judgment herein on all parties or counsel.

21
22 DATED: April 6, 2007

23 _____/s/_____
24 CARLA M. WOEHRLE
25 United States Magistrate Judge
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